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No. 495

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

COMMODORE PARK, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	8
Conclusion	16

CITATIONS

Cases:	
Bailey v. *United States*, 62 C. Cls. 77, certiorari denied, 273 U. S. 751	10, 12
Gibson v. *United States*, 166 U. S. 269	9
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	8, 12
Illinois Central R. R. v. *Illinois*, 146 U. S. 387	13
Scranton v. *Wheeler*, 179 U. S. 141	9
South Carolina v. *Georgia*, 93 U. S. 4	9, 14
Southern Pac. Co. v. *Western Pac. Ry. Co.*, 144 Fed. 160, reversed on other grounds, 151 Fed. 376	12, 14
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	8
Statutes:	
Act of March 3, 1899, 30 Stat. 1121, 33 U. S. C., secs. 401, 403 (Rivers and Harbors Act)	3
Act of June 14, 1934. 48 Stat. 957	2
Act of April 25, 1939, 53 Stat. 590	3
Act of May 25, 1939, 53 Stat. 757	3
Miscellaneous:	
22 Op. A. G. 646 (1899)	12, 13, 14
28 Op. A. G. 433 (1910)	12, 14

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above cause on June 23, 1944, affirming the judgment of the United States District Court for the Eastern District of Virginia, in a proceeding brought by Commodore Park, Inc. under the Tucker Act to recover compensation for property alleged to have been taken or damaged by the United States in connection with the enlargement and extension of the Naval Operating Base at Norfolk, Virginia.

OPINIONS BELOW

The district court's memorandum opinion, with findings of fact and conclusions of law (R. 15–43), is not reported. The opinion of the court below (R. 50–58), together with the dissenting opinion (R. 58), is reported in 143 F. (2d) 720.

JURISDICTION

The judgment of the circuit court of appeals was entered June 23, 1944 (R. 59). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it deepens a portion of a navigable body of water by dredging operations undertaken in aid of navigation, may deposit the dredged material in tributary navigable waters without compensating riparian owners for the attendant loss of their riparian right of access to deep water.

STATEMENT

During World War I Congress established a Naval Operating Base at Hampton Roads, Virginia (R. 19). In 1934 Congress authorized the acquisition of certain lands in the vicinity of Willoughby Bay, an appendage of Hampton Roads, to provide additional naval aviation facilities. Act of June 14, 1934, 48 Stat. 957. The

necessary appropriations were not forthcoming until 1939, when Congress authorized the acquisition by purchase or condemnation of still other lands in that area for the same project. Act of April 25, 1939, 53 Stat. 590, 592; Act of May 25, 1939, 53 Stat. 757, 772–773. Pursuant to these statutes the Navy Department entered into a contract with the Virginia Engineering Company entitled "Contract NOy–4158 for aviation shore facilities at the Naval Air Station, Norfolk, Virginia," for work to cost $13,700,000 (R. 22). It was contemplated under this contract that the Virginia Engineering Company would develop a large seaplane operating base in the southerly portion of Willoughby Bay by dredging operations which would provide 10 to 14 feet of water at mean low tide (R. 26, 27). The materials thus dredged by hydraulic methods from Willoughby Bay were to be deposited in the creeks, sloughs, and other low areas (principally Boush and Mason's Creeks, navigable streams which empty into Willoughby Bay at that point) behind steel bulkheads, dykes, and other retaining walls (R. 26–28).

Inasmuch as sections 9 and 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U. S. C. secs. 401, 403, make it unlawful to fill or dredge a navigable waterway of the United States unless the work is first approved by the War Department, the naval commandant

applied for permits from the War Department for dredging Willoughby Bay and the filling in of Mason's Creek and Boush Creek (R. 25). The necessary permits were granted by the War Department (R. 28–33). As a result of the dredging operations thus undertaken, some 18,000,000 cubic yards of mud and silt were deposited in the creeks and low areas to the south of Willoughby Bay, with the result that Mason's Creek was filled to a distance of approximately a mile upstream, at which point another retaining dyke had been constructed (Tr. 5–6; see map labeled Enclosure A, being Pl. Ex. 2, original; cf. Govt. Ex. 31, original).[1] In order to provide drainage for the area formerly drained by Mason's Creek, the Government constructed an underground culvert leading from the unfilled portion of Mason's Creek and emptying into Willoughby Bay at a point to the east of the original outlet of Mason's Creek. This semi-circular culvert, some twenty feet in diameter and constructed at a cost of $500,000, was closed to navigation by an iron grill at the point where it emptied into the Bay (R. 35–36).

At about the time that these improvements were being undertaken by the Government, respondent Commodore Park, Inc., acquired from the City of Norfolk for subdivision purposes a large tract of land located about a mile and a quarter from the

[1] The portion of Mason's Creek filled in by material dredged from Willoughby Bay is shown in red on Enclosure A (Tr. 6).

mouth of Mason's Creek, bounded on the west and southwest by two prongs of Mason's Creek, and on the north by Oast's Creek, a tributary of Mason's Creek (see Pl. Ex. 2, original, and map labeled Enclosure B, being Govt. Ex. 13, original).[2]

Respondent on June 8, 1942, brought suit under the Tucker Act, contending that the closing of Mason's Creek had deprived the property in question of riparian rights which it had formerly enjoyed—access to deep water via Mason's Creek and Willoughby Bay into Hampton Roads (R. 1–5, 17). The complaint was subsequently amended to include damages alleged to have resulted from silt carried in suspension up Mason's Creek and deposited in Oast's Creek, and along the shores of respondent's property between high and low water mark (R. 4, 17).

The Government moved to dismiss the complaint, contending that the improvements were made in aid of navigation and in the exercise of the Government's navigation servitude; that the damages were consequential in character; that there had been no taking which would give rise to an implied contract to pay compensation; and that the complaint should therefore be dismissed (R. 8–9). The court decided to take evidence and hear the case on the merits before passing upon the Government's motion to dismiss.

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[2] On some exhibits and by several of the witnesses the northerly prong of Mason's Creek is denominated Darby's Creek. The court's findings and conclusion refer to this prong as part of Mason's Creek (see R. 34).

After hearing evidence the court found as a fact that Mason's Creek was originally a navigable waterway of the United States, and that as a result of the dredging operations in Willoughby Bay and the deposit of spoil at the mouth of Mason's Creek, it no longer afforded respondent access to Willoughby Bay (R. 34, 35). He further found that Oast's Creek was never navigable in fact though tidal in character; that the filling in of this creek by silt carried upstream had resulted in newly made land the value of which more than offset any damage caused by silting of Oast's Creek; that the only deposits of silt above the high-water line were the result of subsequent dredging of Mason's and Oast's Creeks done by the Navy Department at the request of the landowners (R. 34, 36, 37–39). He accordingly disallowed respondent's claim for damages allegedly caused by the silting in of Oast's Creek and by subsequent dredging operations in both creeks (R. 39–40).[3] The court, however, found that the depositing of some silt in the bed of Mason's

[3] Since the respondent took no cross-appeal below, the amended claim for damages allegedly caused by the silting in of Oast's Creek and the subsequent dredging of Mason's Creek and Oast's Creek at respondent's request was eliminated from the case. The sole issue which remains is whether respondent can recover for depreciation in the value of its lots resulting from the loss of access to the navigable waters of Willoughby Bay via Mason's Creek and from the deposit of some silt on respondent's property between the high and low water marks (R. 40, 42).

Creek in front of respondent's land had injured certain of its lots riparian to this stream to the extent of $9,120; that the closing of Mason's Creek had relieved the respondent of the duty of constructing a boat harbor at the juncture of the two prongs of Mason's Creek; that the dredging of such a harbor would have cost $1,250, which sum should be deducted from the damages suffered (R. 41–42). Having concluded as a matter of law that the dredging of Willoughby Bay and the closing of Mason's Creek had been done for national defense purposes rather than "in aid of navigation" he entered judgment against the United States in the amount of $7,870 with interest at 4 percent from September 1, 1941, until paid (R. 42–43).

On appeal all three judges agreed that the trial court erred in holding that the dredging of Willoughby Bay was not done for the purpose of aiding navigation or commerce (R. 56, 58). Two of the judges were of the view, however, that the filling in of Mason's Creek with the spoil removed from Willoughby Bay was not in aid of navigation and accordingly affirmed the judgment of the district court (R. 56–58). Judge Dobie dissented on the ground that the dredging was clearly in furtherance of commerce and navigation and that the deposit of dredged material in Mason's Creek was an integral part of the improvement to navigation (R. 58).

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REASONS FOR GRANTING THE WRIT

1. The court below recognized, on the authority of *Greenleaf Lumber Company* v. *Garrison*, 237 U. S. 251, that the power of the Federal Government over navigable waters may be exercised for the benefit of its naval vessels. The court also recognized that the appropriation of lands below ordinary high-water mark, and the deprivation of riparian rights such as access to deep water, do not constitute a compensable taking where the action is in aid of navigation and commerce, for such action is merely the exercise of the Government's dominant servitude for that purpose. *United States* v. *Chicago, M., St. P. & P. R. R. Company*, 312 U. S. 592, 596–597, and cases there cited.[4] The court held, however, that the deposit of the dredged material was not in aid of navigation.

In so holding, it is submitted, the court failed to give effect to the principle that the United

[4] There was no physical invasion here of any upland property owned by the respondent. The filled portions of Mason's Creek did not touch respondent's land at any point (Tr. 39–40, 41). Any silt which may have been deposited *above* the high-water line resulted from the subsequent dredging of Oast's Creek and Mason's Creek done at respondent's request, and which the district court held was noncompensable (R. 36–40). See p. 6, note 3, *supra*. There was simply an interference with certain riparian rights—access to deep water—and the deposit of some silt in the bed of Mason's Creek opposite lots 206, 211–222, but below the high-water line (R. 17, 35, 37, 40, 42; Tr. 46, 77, 87, 125, 126, 127, 142, 143, 240).

States may obstruct navigation in one place to improve navigation and commerce elsewhere. Thus, in *South Carolina* v. *Georgia*, 93 U. S. 4, the Government blocked the channel of the Savannah River to the north of Hutchinson's Island for the purpose of improving the southern channel. This deprived the lands along the northern channel of riparian rights which they had formerly enjoyed. The state of South Carolina contended that the Government by virtue of its commerce power could not place obstructions in a navigable stream. In rejecting South Carolina's contention this Court said (pp. 11–12):

> It is not * * * to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

In a similar manner the Government has frequently closed shallow portions of a river to navigation by constructing piers and jetties therein, thus depriving certain riparian owners of all access to deep water. The resulting injuries are nevertheless not compensable. *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Gibson* v. *United*

States, 166 U. S. 269, 275–276. In such cases the question is not whether the same improvement to navigation might have been achieved by the adoption of other measures which would have preserved the navigability of those waters which were obstructed or closed in connection with the project. Similarly in the present case it should not be significant that the same improvement to navigation might have been accomplished even though the dredged material had been deposited elsewhere. As the method adopted was a reasonable one, the courts should not be called upon to award compensation for the deprivation of riparian rights.

2. The decision below is in conflict with that of the Court of Claims in *Bailey* v. *United States,* 62 C. Cls. 77, certiorari denied, 273 U. S. 751. In that case the plaintiffs had leased from the state of Virginia 26.8 acres of submerged land in Willoughby Bay for the growing of oysters (p. 78). In 1917, in order to provide a submarine base and other naval facilities, the Navy Department constructed a bulkhead across plaintiff's tract by driving a row of timber piles with sheet-piling between. This bulkhead cut the tract into two portions, 10.6 acres lying shoreward of the bulkhead (p. 84). In Willoughby Bay, just outside of and parallel with the bulkhead, the Government dredged a 9-foot channel (p. 88). It also dredged a 25-foot channel leading to Hamp-

ton Roads (p. 91). The dredged material was deposited behind the bulkhead, thus converting 10.6 acres of plaintiff's property into dry land (pp. 85, 91), which the Navy proceeded to use for aviation purposes (p. 91). As a result of these dredging and filling operations plaintiffs' oyster beds were completely destroyed, the owners suffering damages amounting to $7,051 (p. 92). The claim therefor was dismissed and this Court denied certiorari.

There, as here, "the construction of the bulkhead and filling in of the space between it and the original shore line of the bay was a part of the program for constructing and providing a naval operating base * * * for the various uses of the United States Navy" (p. 85; cf. Tr. 17, 18, 37, 50, 368). There, as here, the dredging and filling was done pursuant to a permit issued by the War Department (p. 85; cf. R. 28–33). There, some of the dredged material was taken from Hampton Roads and deposited in a portion of Willoughby Bay which was theretofore navigable but which was thus converted into dry land to the damage of persons possessed of riparian rights (pp. 85, 91). Here, the Government, in order to provide an important seaplane base in Willoughby Bay, has deposited the dredged material in Mason's Creek, a relatively unimportant navigable body of water, thus closing it to navigation. As Judge Dobie pointed out, and as the record makes clear

(R. 26–28), the deposit of the dredged material in Mason's Creek was an integral part of the improvement of navigation undertaken in Willoughby Bay. In the permits sought and obtained from the War Department, permission was granted "to construct dykes, bulkheads, and retaining walls in Mason's and Theleball's Creeks and to fill the portions of those bodies of water thus enclosed, with materials dredged from the Bay" (R. 24; cf. R. 23, 26–33). The dredging and filling was accomplished by hydraulic means as an integrated operation (R. 23). In approving the plans submitted by the naval commandant, the War Department apparently deemed the entire program a reasonable method of providing a seaplane base in Willoughby Bay. There is nothing in the record to show that the administrative decision on this matter was arbitrary or capricious, even assuming the matter was one reviewable by the courts. See *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 268. By closing Mason's Creek at its mouth and diverting the waters of this stream into the Bay at another point (R. 35), the Navy Department prevented the continued deposit of silt in the dredged-out portion of Willoughby Bay (see Govt. Ex. 34, original).

The *Bailey* case is in accord with other authority by which administrative action has been guided. 22 Op. A. G. 646 (1899); 28 Op. A. G. 433 (1910); *Southern Pac. Co.* v. *Western Pac.*

Ry. Co., 144 Fed. 160, 203 (N. D. Cal. 1906), reversed on other grounds, 151 Fed. 376 (C. C. A. 9, 1907).

In 22 Op. A. G. 646 (1899), Attorney General Griggs was asked whether the city of Chicago could legally prohibit the dumping of material dredged from the harbor of Chicago in portions of Lake Michigan designated for that purpose by the Secretary of War. In holding that the city could not interfere with these operations, the Attorney General said (p. 651).

> * * * Congress has power to regulate and improve the harbors of the navigable waters of the United States by dredging the bottom and deepening the water, or by such other ways as it deems necessary in aid of navigation. And this, of course, carries with it the right to deposit the material thus removed in any other part of the harbor or the navigable waters of the United States, or other places within its control.

The majority in the instant case sought to distinguish this opinion on the ground that Attorney General Griggs did not expressly say that this could be done without the payment of compensation. Whatever may be thought of this attempted distinction,[5] it does not explain the subsequent opin-

[5] The attempted distinction seems unsound. Attorney General Griggs was no doubt familiar with the famous case of *Illinois Central R. R.* v. *Illinois*, 146 U. S. 387, decided 7 years earlier. There the Supreme Court had held that title to a portion of the bed of Lake Michigan had passed to the

ion by Attorney General Wickersham in 28 Op. A. G. 433 (1910). There, the Secretary of War proposed to improve the main navigable channel in the Hudson river and to deposit the excavated material in the areas of shoal water behind and shoreward of existing harbor lines. The question arose whether this could be done without the consent of the riparian owners thus affected and without the making of compensation. Attorney General Wickersham concluded that there was no question but that the Federal Government, under its duty in respect to interstate commerce, may "take material excavated from one portion of the bed of a river and deposit it in another portion of that bed (whether deep of shoal water); and this without the consent of the owner of the fee in the submerged soil and without compensation to him" (p. 434), citing among other authorities *South Carolina* v. *Georgia*, 93 U. S. 4, 11; 22 Op. A. G. 646; and *Southern Pac. Co.* v. *Western P[illegible] Ry. Co.*, 144 Fed. 160 (N. D. Cal. 1906). In commenting on the latter case the Attorney General said (p. 437):

> * * * an injunction was [there] sought among other things to restrain the dredging

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state of Illinois upon her admission into the Union and the state in turn had granted some of these submerged lands to the city of Chicago. In attempting to prohibit the dumping operations the city was no doubt relying, in part, upon its title to the lands in question. The qualifications contained in Attorney General Griggs' opinion are rather pointless if the question of compensation was not involved.

company (which was acting in the improvement of a river under the authority of the Government) from dumping the dredged material into shoal water lying between the harbor line and the shore. The court held (p. 203), citing 22 Op. Atty. Gen. p. 646, *supra,* that this injunction should not be granted, as the power of Congress to improve the harbors and navigable waters "carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control."

3. The decision below raises an important question of federal law. Further action on five complaints already filed in the district court has been postponed awaiting the outcome of the instant case. If the decision of the majority of the court below is allowed to stand, numerous other landowners along Mason's Creek may be expected to assert similar claims in the near future. What is more important, the decision will subject the Government to liability in every case where it dredges material from one portion of a navigable body of water and for reasons of convenience, economy, and the like, deposits such material in adjacent navigable waters to the damage of some riparian owner. In other words, the Government will be obliged either to condemn uplands to be used for spoil areas or else carry the material out to sea in barges. Such a holding would seriously

limit the commerce and navigation servitude accorded the Federal Government by prior adjudications.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

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